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RESTORING INDEPENDENCE TO THE GRAND JURY: A VICTIM ADVOCATE FOR POLICE USE OF FORCE CASES

JONATHAN WITMER-RICH*

ABSTRACT

This Article proposes a grand jury victim advocate to represent the interests of the complainant before the grand jury in investigations into police use of excessive force. Currently, the prosecutor has near-exclusive access to the grand jury, and as a result, grand juries have become almost entirely dependent on prosecutors. Historically, however, grand juries exhibited much greater independence. In particular, grand juries have a long history in America of providing oversight over government officials, bringing criminal charges for official misconduct even when local prosecutors proved reluctant. Permitting the alleged victim of police excessive force to be represented before the grand jury would ensure that the grand jury hears from a representative whose interests are truly aligned with the complainant rather than the police. This addition would give the grand jurors an ability to rediscover and reclaim the tradition of independence, and to provide democratic oversight over cases of alleged police misconduct.

This Article will address the role of the prosecutor and the grand jury in police use of deadly force cases with a view toward American jurisdictions generally, but with a particular focus on Ohio law and recent events in Cleveland, most notably the grand jury proceeding following the shooting of twelve-year-old Tamir Rice on November 22, 2014.

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I. THE PROBLEM

A. *The Prosecutor's Conflict of Interest*

In the past few years, a growing chorus of commentators has criticized the role of prosecutors and grand juries in police use of deadly force cases—such as the shooting of Michael Brown in Ferguson, Missouri; the shooting of Tamir Rice in Cleveland, Ohio; and the choking death of Eric Garner in Staten Island, New York.¹

Critics charge that prosecutors face an inherent conflict of interest when investigating potential excessive force cases against police officers, given that prosecutors work closely with police officers and depend on police cooperation for their own success.² This places pressure on prosecutors not to alienate local police by pursuing criminal charges against individual officers.³

¹ See, e.g., Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016) [hereinafter Levine, *How We Prosecute the Police*]; Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <http://www.gq.com/story/tamir-rice-story>; Matt Taibbi, *A Year Later, the Eric Garner Grand Jury Decision Still Stings*, ROLLING STONE (Dec. 3, 2015), <http://www.rollingstone.com/politics/news/a-year-later-the-eric-garner-grand-jury-decision-still-stings-20151203>; Paul Butler, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops>; see also *infra* notes 2, 5.

² Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016) (arguing that “conflict of interest between local prosecutors and police-defendants is so anathema to our system of justice that it requires removal in every case where an officer is accused of committing a crime”) [hereinafter Levine, *Who Shouldn't Prosecute the Police*]; Peter A. Joy & Kevin C. McMunigal, *Prosecutorial Conflicts of Interest and Excessive Use of Force by Police*, CRIM. JUST. 47 (2015) (“Concern about prosecutorial conflict of interest in handling allegations of excessive force by police is widespread.”); Paul Butler & Monroe Freedman, *Ferguson Prosecutor Should Have Bowed Out*, NAT'L L.J. (Dec. 8, 2014) (“[T]here’s an unethical conflict of interest when a prosecutor participates in the indictment of a police officer in his or her own jurisdiction, because the prosecutor has a personal and professional need to maintain good relations with the police, who have been known to threaten not to cooperate with a prosecutor if a fellow officer is indicted.”); Paul Cassell, *Who Prosecutes the Police? Perceptions of Bias in Police Misconduct Investigations and a Possible Remedy*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/05/who-prosecutes-the-police-perceptions-of-bias-in-police-misconduct-investigations-and-a-possible-remedy/?utm_term=.b2ebdcc25855 (“While it is not necessarily an inherent conflict of interest for a local prosecuting attorney to conduct an investigation into allegations of misconduct by police agencies that he works with regularly, it can create the perception of bias. . . . A district attorney’s office that is one day calling a police officer to the stand as a critical witness may have a difficult time the next day investigating that same officer and charging him with a crime.”); Brian Beutler, *The NYC Cop Who Strangled Eric Garner to Death Is Free Thanks to a Legal Flaw. Here’s How Voters Can Fix It*, NEW REPUBLIC (Dec. 3,

In addition, prosecutors are accustomed to giving credibility to claims by investigating police officers as against conflicting claims by suspects.⁴ As a result, prosecutors may adopt a presumption in favor of the police unless clear evidence contradicts the police narrative and supports the victim's account. Police officer organizations' endorsements often play a critical role in elections of local prosecutors.⁵ All of these forces, critics claim, make prosecutors unlikely to investigate and pursue possible criminal charges against police officers with objectivity.⁶ These criticisms have become part of a high-profile public debate in recent years, although similar criticisms have been levied for decades.⁷

2014), <http://www.newrepublic.com/article/120478/eric-garner-police-officer-shouldve-been-investigated-independently>.

³ Levine, *Who Shouldn't Prosecute the Police*, *supra* note 2, at 1469-70; Joy & McMunigal, *supra* note 2, at 48; Butler & Freedman, *supra* note 2; Cassell, *supra* note 2; Beutler, *supra* note 2.

⁴ Louis B. Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023, 1024-29 (1970).

⁵ Kami Chavis Simmons, *Ferguson and Beyond: Increasing Police Accountability: Restoring Trust and Legitimacy Through the Appointment of Independent Prosecutors*, 49 WASH. U. J.L. & POL'Y 137, 145 (2015) ("[M]ore than 80 percent of local prosecutors are elected, and they not only work closely with police to investigate and punish crimes, but also often depend on police union endorsements to win and keep their jobs. Thus local prosecutors are heavily influenced not to make decisions that would anger those unions.") [hereinafter Simmons, *Ferguson and Beyond*]; Editorial Board, *Reform Prosecuting Police Misconduct: Our View*, USA TODAY (Dec. 10, 2014), <http://www.usatoday.com/story/opinion/2014/12/10/eric-garner-staten-island-police-district-attorney-editorials-debates/20216333/>; Beutler, *supra* note 2 (discussing the need to "to eliminate the conflict of interest that arises—as it did in Ferguson and Staten Island—when local prosecutors investigate the officers on whom they rely for evidence, cooperation, and political endorsements.").

⁶ Simmons, *Ferguson and Beyond*, *supra* note 5; Editorial Board, *supra* note 5; Beutler, *supra* note 2.

⁷ See, e.g., LOUIS STOKES AND DAVID CHANOFF, *THE GENTLEMAN FROM OHIO* 68-71 (Trillium ed., 1st ed. 2016) (discussing police use of deadly force cases in Cleveland from the late 1950s and early 1960s in which grand juries declined to indict notwithstanding evidence of excessive force); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 22 (2001) ("[P]rosecutors often enjoy too close of a relationship with local police and are therefore reluctant to turn against those with whom they have worked."); John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803-804 (2000) ("Prosecutors also find themselves in a difficult position when faced with an accusation of police misconduct. They work closely with police, and their ability to succeed in their everyday tasks of prosecuting routine crimes depends on the work and cooperation of police officers."); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996); Peter Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Juridical Access to the Grand Jury as Remedies for Victims of Police Brutality when the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 272 (1994) ("[T]he close working relationship between the police and prosecutors continues to make it extremely unlikely that many prosecutors will ever mount a credible challenge to systemic police brutality"); Schwartz, *supra* note 4.

Commentators have long observed that prosecutors are very unlikely to pursue criminal charges against police officers—their day-to-day colleagues and allies—for use of excessive force.⁸ And in fact, such prosecutions have historically been rare.⁹

B. Cases are Handled Differently When Police are the Suspects

There is also evidence that in the rare instances in which prosecutors do present to grand juries cases involving police use of force, they do so in a way that is markedly different from most other case presentations to grand juries.¹⁰

In most ordinary criminal cases not involving police officers as suspects, grand jury presentations are brief and cursory affairs, aimed only at passing over the relatively low bar of probable cause.¹¹ Few live witnesses are called, and often the entire presentation consists of hearsay testimony from one officer who was not involved in the investigation.¹² Not all jurisdictions impose a duty on prosecutors to present exculpatory evidence to the grand jury.¹³ There is no clear authority in most jurisdictions requiring prosecutors to explain potential defenses.¹⁴ The more

⁸ Jacobi, *supra* note 7, at 804; Freeman, *supra* note 7, at 719.

⁹ Linda Sheryl Greene, *Ferguson and Beyond: Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 36 (2015) (“[W]hen police use deadly force . . . prosecutions are rare and the circumstances rarely lead to conviction”); Jacobi, *supra* note 7, at 803; Freeman, *supra* note 7, at 726 (“[C]onvictions of police officers for brutality are relatively infrequent. Department of Justice statistics on Criminal Section activities from 1985 to 1994 reflect a lower success rate in its civil rights law enforcement cases than in its general civil rights docket.”).

¹⁰ Freeman, *supra* note 7, at 703 (noting that “[p]olice brutality is treated differently from other crimes”). Freeman states, “Police crimes are underreported, underinvestigated, underprosecuted and underconvicted. If a case clears these hurdles and is successfully prosecuted, the chances are that it will be undersentenced relative to crimes not involving police brutality.” *Id.*

¹¹ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 31 (2002) (“Presentations are brief and perfunctory, usually consisting of little more than a single government agent reading enough of the case file to the grand jury to establish probable cause.”) [hereinafter Simmons, *Re-Examining*].

¹² *See id.*

¹³ *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 2:32, at n.5 (2d ed. 2016) (“Although a prosecutor is required to instruct the grand jury on applicable legal principles, see N.Y. Crim. Proc. Law § 190.25(6), it is unclear whether and to what extent the prosecutor must submit to the grand jury legal instructions relating to possible defenses suggested by the evidence.”); SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:17 (2d ed. 2015) (“In approximately a quarter of the states, there are statutes or judicial decisions that require prosecutors to inform the grand jury of exculpatory evidence in some circumstances. Additionally, the American Bar Association’s Criminal Justice Standards propose a similar obligation. The United States Supreme Court, in contrast, has held that federal prosecutors have no such duty.”).

¹⁴ SUN BEALE ET AL., *supra* note 13, at § 9:10 (stating that in New York, the prosecutor must “advise the grand jury on the nature and effect of complete defenses such as self-defense where the evidence supports such a defense,” but noting that “New York is the only state in which the sufficiency of the prosecutor’s instructions has been litigated extensively”).

elaborate and detailed evidence is saved for the trial and not presented to the grand jury.

In contrast, in several recent high-profile cases, such as the deaths of Michael Brown, Eric Garner, and Tamir Rice, prosecutors have conducted what appeared to be an extensive full-blown “trial” before the grand jury.¹⁵ Prosecutors have called all potentially relevant fact witnesses to testify in person, commissioned multiple expert reports and called expert witnesses, staged and presented elaborate reconstructions, introduced voluminous documentary evidence, and focused extensively on possible defenses.¹⁶ In some cases, prosecutors even took the extremely unusual step of allowing the suspect-officers to testify before the grand jury without being subject to cross-examination.¹⁷

C. Reform Proposals

Commentators have suggested many possible reforms to the prosecutorial function and/or grand jury process that might ameliorate these inherent conflicts of interest and make the grand jury process more fair and neutral.

¹⁵ See Levine, *How We Prosecute the Police*, *supra* note 1, at 745 (examining the “seemingly special precharge and preindictment procedure that police receive”).

¹⁶ In the Tamir Rice case, the Cuyahoga County prosecutor presented extensive evidence, including an enhancement of the video footage, multiple expert witnesses, multiple fact witnesses, 911 call recordings, and physical evidence. While the prosecutor’s office is prohibited from stating what it presented to the grand jury, the prosecutor’s public report indicates the scope of the proceeding. TIMOTHY J. MCGINTY, CUYAHOGA COUNTY PROSECUTOR’S REPORT ON THE NOVEMBER 22, 2014 SHOOTING DEATH OF TAMIR RICE, http://prosecutor.cuyahogacounty.us/pdf_prosecutor/en-US/Rice%20Case%20Report%20FINAL%20FINAL%2012-28a.pdf (last visited Apr. 3, 2017) [hereinafter TAMIR RICE PROSECUTOR’S REPORT]; see also Cory Shaffer, *Grand Jury Hearing Evidence in Tamir Rice Shooting*, CLEVELAND.COM (Oct. 27, 2015), http://www.cleveland.com/metro/index.ssf/2015/10/grand_jury_hearing_evidence_in.html [hereinafter Shaffer, *Hearing Evidence*].

In the Michael Brown case, prosecutors “took a radically different approach” from the ordinary grand jury presentation. Kristin Henning, *Status, Race and the Rule of Law in the Grand Jury*, 58 HOW. L.J. 833, 835-36 (2015). Prosecutors

presented the grand jury with volumes of evidence, encompassing more than 70 hours of testimony on 25 separate days over three months. Jurors heard from about 60 witnesses, including three medical examiners and experts on blood, toxicology and firearms. [Prosecutor] McCulloch claims to have presented “all available evidence” in the case, including evidence that both supported and contradicted a finding of probable cause.

Id.

This pattern was also evident “in the unusually detailed presentation of evidence to the grand jury in the choking death of Eric Garner at the hands of police in Staten Island, New York, which lead to no indictment.” Levine, *How We Prosecute the Police*, *supra* note 1, at 755-56.

¹⁷ Henning, *supra* note 16, at 836 (“[P]rosecutors in Ferguson allowed Wilson to testify for hours with little cross-examination”). For a discussion of the Tamir Rice case, see *infra* Part V.

Some have argued that the secretive grand jury should be abolished, at least for police shooting cases¹⁸—an approach recently adopted by California.¹⁹

Many have suggested various reforms that might limit or eliminate the inherent conflict of interest that local prosecutors face—for example, using an independent prosecutor (sometimes called a special prosecutor) in police use of deadly force cases, rather than relying on the local prosecutor.²⁰ New York recently adopted a version of this approach.²¹ One commentator recently proposed that police officers should be governed by a separate set of criminal rules and procedures, analogous to the Uniform Code of Military Justice that governs the conduct of soldiers in the armed forces.²²

Proposals to abolish the grand jury in police use of deadly force cases obviously solve some of the particular problems associated with the grand jury—such as the prosecutor’s outsized influence over the grand jury—but do so at the cost of losing all of the benefits of the grand jury as well. The grand jury, as a democratic body of laypersons from the community, brings a perspective to the criminal justice system different from that of government officials of any stripe. Kevin Washburn contends that the “grand jury can play a significant role in restoring the legitimacy of American criminal justice, particularly in communities of color.”²³ He argues that there are benefits to “restoring decision-making to community groups” and that grand jury reform should seek to ensure that the grand jury is closely connected to “the people in the local community.”²⁴ Likewise, other scholars have defended the value of the grand jury, albeit while urging reforms to render grand juries more independent of prosecutors.²⁵

¹⁸ See Melody Gutierrez, *Calls Grow to Eliminate Grand Juries' Secrecy in Police Killings*, S.F. CHRON. (Dec. 14, 2014), <http://www.sfgate.com/crime/article/Calls-grow-to-eliminate-grand-juries-secrecy-5956945.php>.

¹⁹ Melanie Mason, *Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases*, LA TIMES (Aug. 11, 2015), <http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html>.

²⁰ See, e.g., Simmons, *Ferguson and Beyond*, *supra* note 5 (discussing independent prosecutor proposals); Editorial Board, *A Crisis of Confidence in Prosecutors*, N.Y. TIMES (Dec. 8, 2014), <https://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html?hp&action=click&pgtype=Homepage&module=c-column-top-span-region®ion=c-column-top-span-region&WT.nav=c-column-top-span-region>; Editorial Board, *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), https://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html.

²¹ See Noah Remnick, *Cuomo to Appoint Special Prosecutor for Killings by Police*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/08/nyregion/cuomo-to-appoint-special-prosecutor-for-killings-by-police.html?_r=0.

²² Monu Singh Bedi, *Toward a Uniform Code of Police Justice*, U. OF CHI. LEGAL FORUM, 2016 (Dec. 27, 2016), <https://ssrn.com/abstract=2890725>.

²³ Kevin Washburn, *Restoring the Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 254 (Roger Anthony Fairfax, Jr. ed. 2011).

²⁴ *Id.* at 254-55.

²⁵ See, e.g., Roger A. Fairfax, Jr., *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE

Proposals to create an independent prosecutor lessen some of the conflicts of interest faced by a local prosecutor who daily works with and depends on the cooperation of local law enforcement agencies. But even with an “independent” prosecutor, the question remains of how the independent prosecutor is appointed—and whether that appointment process results in a representative before the grand jury that does not labor under an inherent predisposition toward the police.²⁶

This Article seeks a different path—one that preserves the use of the grand jury while attempting to restore its historical independence and once-vital role as a democratic body providing oversight and accountability for government officials. It does so not by reforming the grand jury itself, but by giving the grand jury access to voices outside of the prosecutor’s office. Viewed from the opposite perspective—from outside the grand jury—the proposal seeks to enable aggrieved private citizens to have direct access to the grand jury to seek review and possibly criminal charges against one particular set of government officials—police officers.

II. THE GRAND JURY VICTIM ADVOCATE

This Article proposes a mechanism for the grand jury victims advocate to enhance the independence of the grand jury in police use of deadly force cases and to ensure that the grand jury has a chance to hear and consider a presentation of the evidence by an advocate seeking criminal charges, rather than a prosecutor potentially seeking political cover.

Briefly stated, a victim advocate would be a representative of the alleged victim of the potential crime—the complainant. That victim advocate would be given access to the grand jury equal to that of the prosecutor—the right to present witnesses and evidence, the right to cross-examine witnesses, and the right to argue for the grand jury to return an indictment (or a presentment, where available).²⁷

A grand jury victim advocate would not have to be a lawyer. An alleged victim of police use of excessive force could appear personally before the grand jury to argue and present evidence in pursuit of an indictment. A non-lawyer community activist could appear on behalf of the alleged victim or the family of the alleged victim. While non-lawyers would lack the expertise a professional prosecutor brings to the grand jury process, the involvement of a non-lawyer is less problematic before the grand jury than at a public trial. In many jurisdictions, the grand jury process is considerably less bound by legal procedural constraints—the rules of evidence are

GRAND JURY 57-84 (Roger Anthony Fairfax, Jr. ed. 2011) (defending the value of the grand jury exercising discretion in criminal charging); Simmons, *Re-Examining*, *supra* note 11, at 2 (“[T]hose who argue that the grand jury is unqualified betray a fundamental misunderstanding of the true role of grand juries in modern society. In truth, the grand jury is able and qualified to have a significant, meaningful, and positive impact on the criminal justice system—but only if we understand its actual function and only if it operates with the proper set of procedural rules.”).

²⁶ For commentators questioning the effectiveness of an independent prosecutor in police cases, see, for example, Levine, *Who Shouldn’t Prosecute the Police*, *supra* note 2, at 1488-93; Delores Jones-Brown, Opinion, *Special Prosecutors are Useful, but not a Guarantee Against Prejudice*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garner-require-a-special-prosecutor/special-prosecutors-are-useful-but-not-a-guarantee-against-prejudice>.

²⁷ For a discussion of the presentment power, see *infra* Part IV.B.

lessened, and hearsay evidence is often permitted.²⁸ Moreover, the grand jury is only determining probable cause—routinely described as a common-sense, practical determination.²⁹ The grand jury is not making the ultimate decision of whether a person is guilty of a crime, but only the preliminary determination of whether a criminal charge is warranted.³⁰

The proposal to give a victim advocate access to the grand jury is limited to cases involving alleged police misconduct. In ordinary cases not involving police officer suspects, there does not appear to be a systematic conflict of interest on the part of the prosecutor that might prevent her from advocating zealously on behalf of the alleged victim. The role of grand jury victim advocate is designed to enhance the independence and power of the grand jury in one particular area in which the independent grand jury historically played a crucial role—the oversight of alleged government misconduct.

This proposal is similar to one Professor Peter Davis made in 1994, following the failed prosecution of officers involved in the beating of Rodney King.³¹ Professor Davis suggested giving the victim of alleged police brutality

access to the grand jury—against the wishes of the public prosecutor—in the context of police brutality cases and other instances of governmental misconduct, because these cases: (1) often involve a built-in prosecutorial conflict of interest, (2) present every opportunity for the public prosecutor to drag his feet, and (3) pose questions of enormous public importance.³²

Part III of this Article examines the historical role of the grand jury as an independent, democratic body providing accountability for misconduct by government officials. It discusses the unique benefits of oversight conducted by a democratic lay institution as opposed to oversight by other government officials. This important historical function provides some reason to be cautious about proposals to abolish the grand jury altogether.

Part IV of this Article turns to the benefits of grand jury independence and how a grand jury victim advocate could significantly assist in re-establishing grand jury independence. It notes how, in police use of deadly force cases, the most common criticism of the grand jury—that it fails to adequately screen cases and merely rubber stamps all charges for the prosecutor—is reversed. Rather than failing to adequately serve as a shield, the grand jury in police use of deadly force cases often fails to act with adequate zeal—fails to bring charges against officers when there is good cause to proceed notwithstanding a reluctant prosecutor. The Article discusses how a grand jury victim advocate would address this problem by ensuring there is a party before

²⁸ SUN BEALE ET AL., *supra* note 13, at § 4:20 (“In most jurisdictions the rules that govern the presentation of evidence in judicial proceedings are relaxed to some degree in grand jury proceedings. . . . [T]he grand jury developed as a lay body that traditionally operated free of the technical rules of judicial procedure and evidence.”).

²⁹ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 244 (1983) (referring to “the practical, common-sense judgment called for in making a probable-cause determination.”).

³⁰ SUN BEALE ET AL., *supra* note 13, at § 4.5; Flynn, *supra* note 1.

³¹ See Davis, *supra* note 7, at 275.

³² *Id.* at 296-97.

the grand jury earnestly and vigorously seeking to establish the required probable cause.

Part V of this article considers this proposal in light of one particular high-profile police use of force case from Cleveland—the shooting of Tamir Rice and the controversial conduct of prosecutors during the subsequent grand jury proceeding. It evaluates how that case might have proceeded differently if a grand jury victim advocate had been permitted access to the grand jury.

III. THE GRAND JURY’S HISTORICAL ROLE IN OVERSIGHT OF MISCONDUCT BY GOVERNMENT OFFICIALS

Throughout British and American history, the grand jury often played a critical role in public oversight, in particular serving as a watchdog against misconduct by government officials. In its earliest form, the British grand jury was a tool of the king—a mechanism for using prominent local men to bring to the attention of the monarchy persons believed in the community to have committed crimes.³³ Henry II in 1166 provided that a group of prominent local men should “disclose under oath the names of those the community believed guilty of criminal offenses.”³⁴

Centuries later, a second role emerged—the grand jury provided a shield between the king and the citizenry, refusing to issue indictments in baseless or politically-motivated prosecutions.³⁵ The group of local citizens served not only to assist the king in identifying and charging potential criminals, but also in refusing to allow criminal charges when they were unwarranted.³⁶

These two functions are reflected in the “colorful metaphor” now commonly used—“the grand jury acts as both shield and sword.”³⁷ The “sword” is the grand jury’s role in “investigating whether crimes have been committed and, if so, who committed them.”³⁸ The “shield” is the grand jury’s role in ensuring, once a government prosecutor is pursuing a criminal charge against a named individual, that

³³ RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* 1 (Brown U. ed., 1963); see also Simmons, *Re-Examining*, *supra* note 11, at 4-5 (describing the early grand jury accusation power, and noting that “[t]here is no evidence that the grand jury acted as a ‘shield’ protecting the accused from the Crown during these first few hundred years”).

³⁴ YOUNGER, *supra* note 33, at 1; see also Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 408-09 (2006) (“During the first three centuries of the grand jury’s use in England, it served largely the interests of the monarchy.”) [hereinafter Fairfax, Jr., *Jurisdictional Heritage*].

³⁵ YOUNGER, *supra* note 33, at 2; Fairfax, *Jurisdictional Heritage*, *supra* note 34, at 409 (“English history demonstrates that the grand jury was transformed from merely an arm of the Crown into a protector of individual liberty.”).

³⁶ Fairfax, *Jurisdictional Heritage*, *supra* note 34, at 409.

³⁷ SUN BEALE ET AL., *supra* note 13, at § 1:7; see also Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 262-63 (1995) (stating that “grand juries perform only two tasks,” the “screening function” and the investigative function).

³⁸ SUN BEALE ET AL., *supra* note 13.

“there is sufficient evidentiary support to justify holding the accused for trial on each charge.”³⁹

Somewhat overlooked is the third role of the grand jury—that of the grand jury as a body of citizens playing an administrative role, including providing oversight over the conduct (or misconduct) of government.⁴⁰ This role was prominent in colonial and early American grand juries⁴¹ although it has diminished substantially in modern times.⁴² As shown below, however, remnants of this role remain in many American jurisdictions. It is this unique function that may provide a powerful tool in the contemporary struggle to provide adequate accountability for law enforcement officers who misuse their powers.

The role of the grand jury as government watchdog was prevalent during the American Revolution when colonial grand juries wielded their powers of accusation against British officials—such as British soldiers—for perceived abuses of government powers.⁴³ “In the grand jury discontented American colonists had discovered a potent weapon with which to harass royal officials and protest against British authority.”⁴⁴ First—acting as shield—colonial grand juries refused to indict colonists engaged in rebellious acts against the British Crown, such as leaders of the Stamp Act riots.⁴⁵

More significantly, colonial grand juries also turned their powers affirmatively against British government officials. For example, “In March, 1769, the Boston inquest denounced soldiers quartered in the town for breaking and entering dwellings, waylaying citizens, and wounding a justice of the peace during a riot.”⁴⁶ Grand juries throughout the colonies issued general complaints against Great Britain and in defense of colonists’ rights, and these pronouncements were copied and reprinted in colonial newspapers.⁴⁷

Even before the Revolution, the grand jury’s power of government oversight was evident in the first grand jury to operate in the colonies.⁴⁸ In the Massachusetts Bay

³⁹ *Id.*

⁴⁰ See Ronald F. Wright, *Grand Juries and Expertise in the Administrative State*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 293, 293 (Roger A. Fairfax, Jr. ed., 2011) (referring to “one strand in the history of the American grand jury: the grand jury’s administrative functions, which were distinct from its power to indict targets of criminal investigations”).

⁴¹ See YOUNGER, *supra* note 33, at 2-3.

⁴² Wright, *supra* note 40, at 298.

⁴³ YOUNGER, *supra* note 33, at 27.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 29-30; see also Fairfax, *Jurisdictional Heritage*, *supra* note 34, at 410 (quoting Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L. J. 1333, 1337 (1994) (“Colonial grand juries also played a part in expressing colonists’ dissatisfaction with the exercise of monarchical power by nullifying attempted prosecutions of critics of the Crown and aggressively issuing ‘angry and well-publicized presentments and indictments’ against representatives of the Crown.”)).

⁴⁷ YOUNGER, *supra* note 33, at 34-35.

⁴⁸ *Id.* at 6.

Colony in 1635, the grand jury included “several of the colony’s magistrates” among the offenders it presented for charging to Governor John Winthrop.⁴⁹

Even beyond the power to charge local officials with criminal offenses, the grand jury in colonial America “acted in the nature of local assemblies: making known the wishes of the people, proposing new laws, protesting against abuses in government, performing administrative tasks, and looking after the welfare of their communities.”⁵⁰ Grand juries in early American history were often charged with performing administrative tasks, including ongoing oversight of government.⁵¹ “In Indiana and Illinois every panel had to inquire in to [sic] the conditions of the local jail and the treatment of prisoners and to report its findings to the court.”⁵² In Arkansas, grand juries were charged with “examining toll roads and bridges and reporting those found to be unsafe or impassable.”⁵³ Grand juries sent petitions to state legislatures asking for action on items ranging from wolves to taxation to the conduct of the judicial system.⁵⁴

In the nineteenth century, as settlers moved West, grand juries played a prominent role in government oversight. Some territories, such as Arizona and New Mexico, “charged inquests to investigate all ‘wilful and corrupt misconduct of public officials.’”⁵⁵ “[E]ven in those jurisdictions where there was no specific statute, grand juries denounced and indicted public officials they found guilty of malfeasance or corruption.”⁵⁶ Grand juries throughout the West charged government officials with misconduct including corruption by government ration officers, theft by federal Indian agents, receipt of illegal fees by a county judge and clerk, and embezzlement by local officials.⁵⁷ The grand jury’s power of investigation and charging “frequently proved the only effective weapon against organized crime, malfeasance in office, and corruption in high places.”⁵⁸

Peter Davis describes how nineteenth-century grand juries took on organized crime and corruption in local government, either without the assistance of or against the wishes of the local prosecutor—who was sometimes complicit in the corrupt system.⁵⁹ A New York grand jury played a crucial role in dismantling the Boss Tweed ring in 1872:

[Grand jurors] set out to find evidence against city officials without the assistance of experts from the district attorney’s office. The jury

⁴⁹ *Id.*

⁵⁰ *Id.* at 2; *see also* Wright, *supra* note 40, at 294-96.

⁵¹ Wright, *supra* note 40, at 295-96.

⁵² YOUNGER, *supra* note 33, at 79.

⁵³ *Id.* at 79-80.

⁵⁴ *Id.* at 80-81.

⁵⁵ *Id.* at 160.

⁵⁶ *Id.*

⁵⁷ *Id.* at 160-61.

⁵⁸ *Id.* at 3.

⁵⁹ Davis, *supra* note 7, at 303-04.

summoned all manner of witnesses and interrogated them in secret session. To cover all possible sources of information, the twenty-one jurors split up into committees of two and three. These committees visited banks to check on the accounts of public officials, called at the homes of witnesses who were unable to come to the jury, and checked the operations of each of the city departments.⁶⁰

Another New York grand jury investigating illegal gambling discovered that the local prosecutor, A.B. Gardiner, was obstructing their efforts.⁶¹ They “began to subpoena their witnesses directly, without going through the District Attorney’s office,” at times asking the district attorney to leave the room during witness testimony.⁶² The grand jury also spoke “directly to the judge for legal advice.”⁶³

In the early twentieth century, a Cleveland grand jury continued this tradition of independence. In 1933, a grand jury investigated the city police department, “[l]ed by its energetic and fearless foreman, William Feather.”⁶⁴ It issued a report charging that “the entire city had been intimidated by union racketeers who received protection from city officials.”⁶⁵ The Cleveland Plain Dealer commended Feather’s grand jury for its aggressive investigation—praising its contrast with the tradition of grand juries serving only as “the stuffed furniture in the stage setting.”⁶⁶ The grand jury received information from citizens “pointing out districts where police allegedly protect[ed] vice, crime and gambling,” including some accusations against officers who allegedly “receive[d] weekly payments for protection.”⁶⁷ The Feather grand jury concluded by reminding “inquests throughout the state of Ohio that they too could initiate independent investigations.”⁶⁸

The independence of the grand jury from the prosecutor’s office was a critical aspect of the grand jury’s ability to combat local government corruption. “Where corruption extended to the office of the district attorney, the grand jury’s ability to act effectively depended upon its independence of the prosecutor. When necessary, juries demonstrated that they could take investigations into their own hands, ignoring the district attorney.”⁶⁹

This third role of the grand jury—government watchdog—has diminished significantly over the twentieth century, as other government institutions have developed to play that role.⁷⁰ In a number of jurisdictions around the country,

⁶⁰ *Id.* at 302-03 (citing YOUNGER, *supra* note 33, at 188).

⁶¹ *Id.* at 303-04 (citing YOUNGER, *supra* note 33, at 188-89).

⁶² *Id.* at 304.

⁶³ *Id.*

⁶⁴ YOUNGER, *supra* note 33, at 234.

⁶⁵ *Id.*

⁶⁶ *War on the “Known”*, THE PLAIN DEALER (Cleveland), Oct. 10, 1933, at 10.

⁶⁷ *Feather Demands Record of Police*, THE PLAIN DEALER (Cleveland), Oct. 14, 1933, at 5.

⁶⁸ YOUNGER, *supra* note 33, at 234.

⁶⁹ *Id.* at 208.

⁷⁰ See Wright, *supra* note 40, at 298-301.

however, statutes charge grand juries with various government oversight functions independent of their role as either sword or shield with respect to criminal charging. For example, an Ohio statute requires grand juries to regularly “visit the county jail, examine its conditions, and inquire into the discipline and treatment of the prisoners, their habits, diet, and accommodations,” and then report in writing to the court.⁷¹ In Alabama, the grand jury likewise is charged with conducting a personal inspection of the jail to assess the safekeeping and health of the prisoners.⁷² Alabama grand juries are also charged with examining the country treasury and inspecting sheriff records related to the feeding of prisoners.⁷³ Grand juries have similar duties in a number of states, including examination of the condition of jails,⁷⁴ as well as access to public records generally.⁷⁵

This history suggests that grand juries may have particular advantages in providing oversight of government misconduct. In modern times, many of the “public oversight” or quasi-administrative roles of the grand jury have been taken over by government officials and administrative agencies.⁷⁶ But at least in some contexts—such as oversight of the police—there are serious drawbacks to using other public officials rather than a democratic body composed of laypersons from the community. As noted above, many have observed how extraordinarily difficult it is for a prosecutor—who works daily with, and depends on the cooperation of, the police—to serve as an effective, neutral, and unbiased check on police misconduct.

In this context, the grand jury as voice of the community may prove particularly valuable. As a democratic body of laypersons, the grand jury is not beholden to other government officials. Grand jurors are not regular, repeat players in the criminal justice system and, thus, may be more likely to maintain an independent and unbiased perspective toward police officers than those who work with them daily.

In the context of administrative law, Ronald Wright notes that “[t]he exclusion of citizen participation from the administrative process leads to unsound outcomes. An

⁷¹ OHIO REV. CODE ANN. § 2939.21 (West 2017).

⁷² ALA. CODE § 12-16-191 (2017).

⁷³ ALA. CODE § 12-16-192, 193.

⁷⁴ See, e.g., ALASKA STAT. ANN. § 12.40.060 (LexisNexis 2016) (“The grand jury is entitled to access, at all reasonable times, to the public jails and prisons.”); ARK. CODE ANN. § 12-41-508 (LexisNexis 2016) (instilling in the grand jury the duty to visit and report on condition of the jail and the treatment of prisoners); GA. CODE ANN. § 15-12-78 (LexisNexis 2016) (instilling in the grand jury the duty to inspect the jail and report on sanitary conditions and treatment of prisoners); NEB. REV. STAT. ANN. § 47-109 (LexisNexis 2017) (providing grand jury power to “visit the jail, examine its state and condition, and examine and inquire into the discipline and treatment of prisoners, their habits, diet, and accommodations”).

⁷⁵ See, e.g., ALASKA STAT. ANN. § 12.40.060 (“The grand jury is entitled to access, at all reasonable times, . . . to offices pertaining to the courts of justice in the state, and to all other public offices, and to the examination of all public records in the state.”); CAL. PENAL CODE § 921 (2016) (“The grand jury is entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the county.”); N.D. CENT. CODE ANN. § 29-10.1-23 (West 2017) (“Grand jurors are entitled to free access, at all reasonable times, to public prisons, and to the examination, without charge, of all public records in the county.”).

⁷⁶ Wright, *supra* note 40, at 298-301.

agency cut off from the citizens might pursue a policy that harms many people because it has been ‘captured’ by a regulated group.”⁷⁷ Analogously, in the context of police oversight, it is easy to see how a prosecutor might be “captured” by the regulated group—the police department. Richard Younger powerfully sums up the grand jury’s unique advantages in regulating government misconduct:

The grand jury enables the American people to act for themselves rather than have an official act for them. It is the one institution that combines the necessary measure of disinterestedness with sufficient authority to investigate effectively malfeasance and corruption in public office. Today, as in the past, it is the one body that can effectively handle the complaints of individual citizens, whether the grievances be against their fellow citizens or against their government. . . . At a time when centralization has narrowed the area of democratic control, grand juries give the people an opportunity to participate in their government and to make their wishes known.⁷⁸

IV. RESTORING THE INDEPENDENCE OF THE GRAND JURY IN GOVERNMENT OVERSIGHT

A. The Rubber Stamp Grand Jury Versus the Toothless Grand Jury

Many scholars, as well as persons who have served on grand juries, have bemoaned (or simply described) the fact that the grand jury no longer seems to have the independence that it had historically, but instead has become dominated by the prosecutor.⁷⁹

Dean Phyllis Crocker served as foreperson of a Cuyahoga County (Cleveland) grand jury in 2003. In an article she wrote following that experience, she noted how the grand jury was not institutionally capable of true independence:

The reality is that grand juries depend greatly on prosecutors. Due to that dependence, grand juries rarely decline to indict, and are often criticized as mere rubber stamps for the prosecutor. It is not surprising, however, that grand jurors rely on prosecutors. They have to hear and decide large numbers of cases in a short amount of time, yet have little knowledge about the criminal justice system, let alone the elements of criminal offenses. Grand jurors know what the judge states in the initial general

⁷⁷ *Id.* at 304.

⁷⁸ YOUNGER, *supra* note 33, at 245-46.

⁷⁹ See, e.g., SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 22-24 (2016); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 38 (Oxford 2012); YOUNGER, *supra* note 33, at 241-246; Washburn, *supra* note 23; Phyllis L. Crocker, *Appointed but (Nearly) Prevented From Serving: My Experiences as a Grand Jury Foreperson*, 2 OHIO ST. J. CRIM. L. 289, 290 (2004); R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 365 (2000).

instructions, and what the prosecutor tells them about the law as to specific offenses. This creates a singular reliance on the prosecutor.⁸⁰

In the context of police use of deadly force cases, this lack of independence and over-reliance on the prosecutor plays out in reverse of the ordinary problem: rather than being too quick to yield to a prosecutor seeking an indictment in a case that may not warrant one, a too-compliant grand jury in a police use of deadly force case readily acquiesces to the prosecutor's view (either explicit or implicit) that no charges are warranted.

Thus, instead of rubber stamping dubious charges, the grand jury in police use of deadly force cases runs the risk of becoming toothless—failing to bring forth charges against police officers for misconduct due to the outsized influence of another government official, the prosecutor. The compliant grand jury simply reflects the views of the prosecutor, whose professional conflict of interest in cases involving allegations against police officers may make him or her an uncertain and unreliable advocate for victims of police misconduct.

Grand jury reforms have often focused on ways to improve the grand jury's screening (shield) function. More recently, scholars "have argued that the grand jury has a *prosecutorial* role to play as well."⁸¹ In particular, these scholars argue that the grand jury "in effect 'partners' with the prosecutor to determine not only whether there is probable cause to believe an individual committed a crime, but also whether the individual *should* be prosecuted."⁸² Fundamentally, "the grand jury's essential task must be to express the will of the community about the prosecution of the law."⁸³ That includes the community's will not only about when criminal charges should *not* be pursued, but also the community's will about when criminal charges *should* be pursued.

B. Public Participation in Charging: Presentments, Petitions, and Private Prosecution

Today, professional prosecutors largely control the charging decision—when and whether criminal charges should be pursued and against whom.⁸⁴ Historically, there were more opportunities for public participation in charging, and several of these mechanisms persist to varying degrees today. These mechanisms are not the primary

⁸⁰ Crocker, *supra* note 79; see also Wright, *supra* note 40, at 299-300 (noting courts' denials of grand jury requests for support staff; "[p]reventing the grand jury from appointing and controlling its own support staff made the institution more and more ineffective an administrative matters, and increasingly dependent on the full-time prosecutor"); Leipold, *supra* note 37, at 264 ("The root cause of the institution's inability to screen is the jurors' lack of competence to perform their task.").

⁸¹ Roger A. Fairfax, Jr., *Remaking the Grand Jury*, in *GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY* 323, 329 (Roger A. Fairfax, Jr. ed., 2011) (emphasis in original).

⁸² *Id.* at 329-30 (emphasis in original).

⁸³ Washburn, *supra* note 23, at 255.

⁸⁴ See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (describing the remarkably unreviewable power and discretion of the prosecutor); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1523-1554 (1981) (analyzing the prosecutor's broad discretion in charging).

focus of this Article, but they bear brief mention both as a reminder of grand jury independence and as additional possible reforms. Moreover, a grand jury victim advocate might enable grand juries to discover, or rediscover, some of these ways of exercising their oversight powers over police officers.

One example is the grand jury presentment power. At common law, a presentment was “the notice taken by a grand Jury of any offense from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king.”⁸⁵ Today, “[a] presentment is a charge the grand jury brings on its own initiative. In contrast, an indictment is almost always first drawn up by a prosecutor and then submitted to the grand jury for approval.”⁸⁶

A full discussion of the presentment power is beyond the scope of this Article.⁸⁷ For present purposes, suffice it to say that the presentment power is an example of the historical power of the grand jury to initiate criminal charges independently of the state prosecuting attorney.

Some states today explicitly recognize the grand jury presentment power in state statutes. In North Carolina, for example, the grand jury is authorized to

investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made.⁸⁸

In other states, the status of the grand jury’s presentment power is unclear. In Ohio, for example, the state Constitution (like the federal Constitution) specifically mentions presentment as an alternative to indictment: “no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury.”⁸⁹ Yet, the Ohio Revised Code does not contain any statutes discussing, authorizing, or prohibiting the issuance of a presentment by grand jury.⁹⁰

⁸⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES *301; see also Richard H. Kuh, *The Grand Jury “Presentment”: Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1103 n.1 (1955) (“Originally, indictments were couched in formal terms written on parchment in Latin. Presentments, brought in by lay juries on their own initiative, were informal and in English. If they contained criminal charges, such charges were then formalized and followed by the translated formal indictments.”).

⁸⁶ Lettow, *supra* note 46; see also 1 SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 3:4 (2d ed. 2016) (“The difference between [a presentment and an indictment] was that a grand jury initiated a presentment on its own, but received an indictment from a prosecutor.”).

⁸⁷ For discussions of the presentment power, see generally BRENNER & SHAW, *supra* note 86; SUN BEALE ET AL., *supra* note 13; Susan B. Brenner, *The “Voice of the Community:” A Comparison of Federal and State Grand Jury Practice*, 3 VA. J. SOC. POL’Y & L. 67, 109-19 (1995); Lettow, *supra* note 46; Kuh, *supra* note 85.

⁸⁸ N.C. GEN. STAT. § 15A-628(a)(4) (2017).

⁸⁹ Compare OH. CONST. art. I, § 10, with U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”).

⁹⁰ See OHIO REV. CODE ANN. §2939 (West 2017).

Ohio history includes cases prosecuted on presentment rather than indictment.⁹¹ At the same time, Ohio courts have rejected the power of grand juries to issue grand jury reports on civil matters where they are not expressly statutorily authorized to do so.⁹² There is no recent authority, furthermore, stating whether Ohio grand juries retain the common law power to issue charges by presentment.

Suja Thomas bemoans the substantial loss of the presentment power in many American jurisdictions: “grand juries do not serve the independent investigative function through presentments that they performed in the past.”⁹³ She notes the particular relevance of this loss in police shooting cases: in jurisdictions that have eliminated the grand jury presentment power, “grand juries cannot bring an action against a police office for shooting a civilian without the acquiescence of the prosecution.”⁹⁴

Another vestige of the public’s historical access to charging decisions can be seen in an Ohio statute authorizing any “private citizen having knowledge of the facts” to “seek[] to cause an arrest or prosecution” by filing an affidavit charging an offense.⁹⁵ This relatively obscure statute was used by a group of eight clergy members and community activists from Cleveland to prompt judicial action in the Tamir Rice case.⁹⁶

The statute states that a citizen may file this affidavit “with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney[.]”⁹⁷ In the Tamir Rice case, the citizen affidavits filed June 8, 2015, accused officers Timothy Loehmann and Frank Garmback of various offenses under Ohio law, including aggravated murder, murder, and involuntary manslaughter.⁹⁸

Cleveland Municipal Court Judge Ronald Adrine ruled on the petition on June 11, 2015. Judge Adrine recognized that section 2935.09 “provides private citizens the ability to bring forward accusations by affidavit to cause an arrest or prosecution.”⁹⁹ However, he also recognized that the statute did not actually authorize either the private citizens or the reviewing court to initiate a criminal

⁹¹ See, e.g., *State v. Laning*, 18 Ohio Dec. 672, 675 (Ct. Com. Pl. 1908).

⁹² See *Simington v. Shimp*, 398 N.E.2d 812, 814-15 (Ohio Ct. App. 1978).

⁹³ THOMAS, *supra* note 79, at 39. “For all practical purposes, the Federal Rules of Criminal Procedure have abolished the grand jury’s presentment power.” Lettow, *supra* note 46, at 1343.

⁹⁴ THOMAS, *supra* note 79, at 39.

⁹⁵ OHIO REV. CODE ANN. § 2935.09(D).

⁹⁶ Cory Shaffer, *Cleveland Group Seeks Arrests of Officers Involved in Tamir Rice Shooting*, CLEVELAND.COM (June 9, 2015), http://www.cleveland.com/metro/index.ssf/2015/06/cleveland_group_releases_affid.html [hereinafter Shaffer, *Cleveland Group*].

⁹⁷ OHIO REV. CODE ANN. § 2935.09(D)

⁹⁸ Shaffer, *Cleveland Group*, *supra* note 96.

⁹⁹ Judgment Entry at 1, In re: Aff. Relating to Timothy Loehmann & Frank Garmback, June 11, 2015.

charge.¹⁰⁰ Rather, the court interpreted its statutory role as being “advisory in nature.”¹⁰¹ The court explained that actual criminal charges would be filed, if at all, by the city prosecutor or the county prosecutor, in conjunction with a grand jury for any felony charges.¹⁰²

The court also determined, after reviewing conflicting provisions of Ohio law, that the court did not have the legal authority to issue arrest warrants based on the citizen affidavits.¹⁰³ Instead, its task was simply to issue a determination of whether probable cause existed.¹⁰⁴

The court discussed the evidence presented in support of the affidavits—the video of the Tamir Rice shooting.¹⁰⁵ The court described the video as “notorious and hard to watch” and stated that “[a]fter watching it several times, this court is still thunderstruck by how quickly this event turned deadly.”¹⁰⁶ The court noted that the video quality was not excellent, but that it did not appear to show Tamir Rice “making any furtive movement prior to, or at, the moment he is shot.”¹⁰⁷ Tamir Rice’s arms “do not appear to be raised or out-stretched,” and “[t]here appears to be little if any time reflected in the video for Rice to react or respond. . . . Literally, the entire encounter is over in an instant.”¹⁰⁸

Ultimately, the court found probable cause for charges of murder, involuntary manslaughter, reckless homicide, negligent homicide, and dereliction of duty against Officer Loehmann, and probable cause for charges of negligent homicide and dereliction of duty against Officer Garmback.¹⁰⁹

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The court noted a conflict between an Ohio statute and the Ohio Rules of Criminal Procedure. The statute, Ohio Revised Code § 2935.10, provides that unless the affidavit was not filed in good faith or was not meritorious (which the court interpreted to require a finding of probable cause), the reviewing court “shall forthwith issue a warrant for the arrest of the person charged in the affidavit.” OHIO REV. CODE ANN. § 2935.10(A). In contrast, Ohio Rule 4(A)(1) requires that a complaint be filed before an arrest warrant can be issued—and § 2935.09 authorizes a citizen petition, but does not describe it as a criminal complaint. *See* OHIO R. CRIM. P. 4(A)(1); OHIO REV. CODE ANN. § 2935.09(D). Thus, there was a conflict between Rule 4(A)(1) and § 2935.10(A). Under Ohio law, the Ohio Rules supersede conflicting statutes so long as the legal issue in question is procedural rather than a substantive right. *See Proctor v. Kardassilaris*, 873 N.E.2d 872, 876 (Ohio 2007). The court apparently interpreted this provision as a procedural one, as it ruled that Rule 4(A)(1) superseded § 2935.10(A)(1) in this respect.

¹⁰⁴ Judgment Entry, *supra* note 99, at 4.

¹⁰⁵ *Id.* at 2-3.

¹⁰⁶ *Id.* at 2.

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 8-9; *see also* Brandon Blackwell, *Judge Finds Probable Cause for Murder Charge Against Office Who Killed Tamir Rice*, CLEVELAND.COM (June 11, 2015), http://www.cleveland.com/metro/index.ssf/2015/06/judge_finds_probable_cause_for.html.

As noted above, this probable cause determination did not result in the arrest of the officers or the initiation of any criminal proceedings. Thus, Ohio's statutory mechanism for citizen affidavits provides a way for citizens to obtain a probable cause determination and to bring the alleged crimes to the attention of the prosecutor, the police, and the public. It does not, however, actually empower citizens to participate in the charging decision itself.

A final possibility, one that does not appear to exist in most American jurisdictions, is to permit private prosecution of criminal charges in the event the public prosecutor declines to pursue them.¹¹⁰ Private prosecutions were common in American history and remain a feature of the criminal justice system in England.¹¹¹ This represents a more radical proposal than the Ohio "affidavit" process, which permits citizens to seek a probable cause determination but leaves the charging decision in the hands of the prosecutor.

Again, these mechanisms for private participation in the charging decision are not the primary focus of this Article. They do illustrate, however, various procedures whereby the state prosecutor may not have total control over the charging decision.

A grand jury victim advocate would serve a somewhat similar function—to empower a panel of independent citizens to consider and potentially initiate criminal charges even if the state prosecutor is disinclined from doing so. The grand jury victim advocate would assist the grand jury in recognizing and recovering its legal independence from the state prosecutor and, thus, discovering some of the ways it might exercise oversight powers over government officials, in particularly police officers.

C. The Grand Jury's Legal Independence from the Prosecutor

As a legal and historical matter, the grand jury is not a creature of the prosecutor. The prosecutor does not convene the grand jury or (legally) have authority or control over it.¹¹² Many have written about how, as a practical matter, the prosecutor has very strong influence over the grand jury.¹¹³ The point here is simply that prosecutor's grand jury power is not grounded in early historical practice or in the formal legal make-up or power of the grand jury.

Instead, the grand jury is at least somewhat independent of the other parts of the criminal justice system. The court convenes the grand jury, selects its members and foreperson, and gives the jurors general instructions.¹¹⁴ After the grand jury has been

¹¹⁰ See Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 661 (2010) (surveying the history of private prosecution, and arguing "that private prosecutions can be a useful adjunct to the more familiar public model, potentially freeing up scarce public resources while at the same time vindicating the interests—both of the victim and the public—in the enforcement of the criminal law. It is widely acknowledged that the state possesses limited resources to allocate to the criminal justice system.").

¹¹¹ *Id.*

¹¹² Peter F. Vaira, *Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line*, 75 J. CRIM. L. & CRIMINOLOGY 1129, 1130 (1984) (arguing that the balance between the grand jury's investigative role and "its role as an independent accusatory body . . . lies with the integrity and the professionalism of the prosecutor.").

¹¹³ See *supra* note 1, note 79.

¹¹⁴ SUN BEALE ET AL., *supra* note 13, at §4:1.

created, however, the court's involvement is largely complete, and the grand jury operates without ongoing direct court supervision.¹¹⁵

The prosecutor's legal power before the grand jury typically comes from a state statute that gives the prosecutor a right to appear before the grand jury and present evidence, argument, and legal instruction.¹¹⁶

D. The Grand Jury Victim Advocate as a Voice Aligned with the Complainant

A number of reform proposals, noted above, seek various ways to minimize or mitigate the inherent conflict of interest facing a professional prosecutor who is considering criminal charges against the police. The key advantage to the grand jury victim advocate proposal is that it counteracts those concerns by ensuring that there is an advocate before the grand jury whose interests are firmly aligned with the alleged victim of the police use of force.

Of course, a victim advocate would not be an objective and neutral voice—a victim advocate would undoubtedly look at the case from the particular perspective of the alleged victim. The proposal is, therefore, not designed to find a “neutral” voice, but to counteract what might be an inherent and inescapable pro-police bias with another voice that has a bias or perspective of the alleged victim.¹¹⁷

The ultimate goal is not to create a grand jury proceeding that is slanted in favor of the police or against the police, but to empower the grand jury to rediscover its independence of the state prosecutor and to achieve a level of neutrality. As Peter Davis explains,

the benefits of public access to the grand jury are significant. Civilian participation in criminal prosecution brings an entirely different perspective to law enforcement. When citizens are free to approach the grand jury directly or through the impaneling judge, the grand jury “breathes the spirit of the community” as no prosecutor could ever do.”¹¹⁸

The grand jury victim advocate would, therefore, help the grand jury to speak again as the voice of the community, rather than simply parrot the voice of the prosecutor.

V. CASE STUDY FOR THE GRAND JURY VICTIM ADVOCATE: THE TAMIR RICE INVESTIGATION

This Article now turns to consider a particular case study—the Tamir Rice grand jury proceeding—to evaluate how the presence of a grand jury victim advocate might have changed the course of those proceedings.

¹¹⁵ For example, the judge is not one of the persons legally permitted to be present during grand jury proceedings. *Id.* at § 4:10.

¹¹⁶ See OHIO REVISED CODE § 2939.10 (2017); see also SUN BEALE ET AL., *supra* note 13, at § 4:15 (“In the federal courts and in the vast majority of states, the prosecutor has common law or statutory authority to attend the grand jury’s sessions (except those at which the grand jury deliberates and votes), to examine the witnesses that appear before the grand jury, and to give legal advice.”).

¹¹⁷ Davis, *supra* note 7, at 356 (“[G]iving citizens direct access to the grand jury helps to ameliorate the problem of the symbiotic relationship between police and public prosecutors.”).

¹¹⁸ *Id.* at 298 (quoting YOUNGER, *supra* note 33, at 230 (in turn quoting U.S. District Attorney George Z. Medalie, *Grand Juries Value*, THE PANEL 16 (1931))).

Because of grand jury secrecy rules, there are significant limitations on the public's knowledge about what occurred during the Tamir Rice grand jury proceeding. Cuyahoga County Prosecutor Tim McGinty released a significant amount of evidence that was gathered during the police investigation into Tamir Rice's shooting by Cleveland Police.¹¹⁹ He also released several expert reports he commissioned for presentation to the grand jury.¹²⁰ But as in most jurisdictions, Ohio's grand jury secrecy rules prohibit the prosecutor, as well as grand jurors themselves, from revealing what actually occurred inside the grand jury room, except in certain narrow circumstances.¹²¹

These grand jury secrecy rules do not apply to witnesses who testify before the grand jury¹²²—thus, there is no prohibition on a grand jury witness repeating publicly what she told the grand jury or describing what she experienced when testifying before the grand jury. As a result, one source of public information about what occurred in the Tamir Rice grand jury are interviews given to a journalist by several of the witnesses who testified in that proceeding.¹²³ In addition, the police union representing Officers Loehmann and Garmback also provided some information about what occurred when those officers appeared before the grand jury.¹²⁴

These sources reveal two notable aspects of the grand jury proceedings in the Tamir Rice case: (1) the two officers involved in the shooting were permitted to give self-serving statements before the grand jury without being subjected to cross-examination, and (2) experts in police use of force who testified that the use of force was unreasonable were treated with hostility and aggressive cross-examination by the prosecutors. Both of those aspects of the proceeding likely would have been very different had a grand jury victim advocate been present and participating.

First, according to union officials, Officer Loehmann and Officer Garmback appeared before the grand jury and gave sworn statements describing their version of

¹¹⁹ TAMIR RICE PROSECUTOR'S REPORT, *supra* note 16; see also Shaffer, *Hearing Evidence*, *supra* note 16.

¹²⁰ Steve Almasy, *Tamir Rice Shooting was 'Reasonable,' Two Experts Conclude*, CNN (Oct. 12, 2015), <http://www.cnn.com/2015/10/10/us/tamir-rice-shooting-reports/>.

¹²¹ See OHIO R. CRIM. P. 6(E) ("A grand juror [or] prosecuting attorney . . . may disclose matters occurring before the grand jury . . . only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.").

¹²² See *Butterworth v. Smith*, 494 U.S. 624, 634 (1990) ("[N]either the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses with respect to their own testimony"). The Court in *Butterworth* held that Florida's secrecy rules for grand jury witnesses were unconstitutional, at least as applied to witnesses who spoke after the conclusion of the grand jury proceeding. *Id.*

¹²³ Flynn, *supra* note 1.

¹²⁴ Cory Shaffer, *Officers in Tamir Rice Case Were Sworn in Before Grand Jury, Answered No Questions, Union Says*, CLEVELAND.COM (Dec. 3, 2015), http://www.cleveland.com/metro/index.ssf/2015/12/officers_in_tamir_rice_case_we.html

what happened in the Tamir Rice shooting.¹²⁵ Even though they voluntarily gave those statements, prosecutors did not conduct a cross-examination or ask either officer any questions.¹²⁶

The law is clear that once a witness appears in a legal proceeding and begins to testify, he has waived his Fifth Amendment right against self-incrimination as to the subject of his testimony, at least in the proceeding in which he is testifying. “[W]hen a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination.”¹²⁷ The defendant “has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.”¹²⁸ This general principle is the same whether the witness is testifying in a criminal trial, a civil trial, or before a grand jury—“[t]he reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf.”¹²⁹

In the Tamir Rice grand jury, once Officer Garmback and Officer Loehmann read their prepared statements under oath, they had waived their Fifth Amendment rights as to that grand jury proceeding. It is less clear whether those statements also constituted a waiver at a potential future criminal trial.¹³⁰ But by reading the statements about what happened during their encounter with Tamir Rice, Officer Loehmann and Officer Garmback each waived their Fifth Amendment rights about that subject, at least for the purposes of the grand jury proceeding.¹³¹

Thus, the prosecutors had a remarkable opportunity—to thoroughly question the two officers involved in the shooting, under oath and before the grand jury, to test

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013).

¹²⁸ *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

¹²⁹ *Brown v. United States*, 356 U.S. 148, 155 (1958).

¹³⁰ Courts are divided on this question, with the majority holding that testimony before a grand jury does not constitute a waiver of the Fifth Amendment privilege at a subsequent trial because the trial is a separate proceeding from the grand jury process. See Michael A. DiSabatino, *Right of Witness in Federal Court to Claim Privilege Against Self-Incrimination After Giving Sworn Evidence on Same Matter in Other Proceedings*, 42 A.L.R. FED. 793 (originally published in 1979).

¹³¹ Another possibility is that prosecutors agreed to let Officer Loehmann and Officer Garmack read the statements before the grand jury and provided the officers an assurance that this testimony would not constitute a waiver of the Fifth Amendment right. (Because the prosecutors are forbidden by grand jury secrecy rules from discussing what occurred before the grand jury, they are unable to respond to the account given by the union officials.) If prosecutors offered such assurances, then it is possible that the statements did not constitute a waiver. In that scenario, what is remarkable is that prosecutors agreed to allow them to read self-serving statements without submitting themselves to questioning. Prosecutors in similar situations offer a suspect a choice—a suspect may choose to testify before the grand jury and tell his side of the story. In exchange, however, prosecutors will cross-examine the suspect. Alternatively, the suspect can invoke his Fifth Amendment right and refuse to provide any testimony. But if the suspect will invoke, prosecutors ordinarily will not allow the suspect to give a one-sided, self-serving statement, untested by questioning or cross-examination.

whether the officers' self-serving statements proved reliable under cross-examination. Their reported failure to ask any questions is astounding. Had a grand jury victim advocate—a lawyer representing the Tamir Rice family—been participating in the grand jury proceedings, both Officer Loehmann and Officer Garmback would have been subjected to extensive cross-examination after each read his sworn statement. This would have permitted the grand jury an invaluable opportunity to observe each officer's demeanor, the consistency of their accounts (with each other and with the other available evidence), and to hear additional details beyond those the officers themselves chose to address.

The problem with allowing a witness to give a self-serving statement while still maintaining the right to invoke the Fifth Amendment privilege has been repeatedly explained by the Supreme Court. A witness

cannot reasonably claim that the Fifth Amendment gives him not only [the choice not to testify] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.¹³²

Once a witness “provides testimony and then refuses to answer potentially incriminating questions, ‘[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.’”¹³³

The other significant detail that has emerged about the conduct of prosecutors during the grand jury comes from three expert witnesses who appeared and testified before the grand jury.¹³⁴ Roger Clark, a former LAPD officer, is an expert on police use of force who was hired by lawyers for the Tamir Rice family to review the case. He concluded—contrary to the view of experts retained by the prosecution—that the use of deadly force was unreasonable.¹³⁵ Notably, prosecutors permitted him to appear and testify before the grand jury—an accommodation to the Tamir Rice family.¹³⁶ Clark later recounted that the prosecutors treated him with disdain, open hostility, and aggressive cross-examination.¹³⁷

Clark stated that, during his testimony before the grand jury, two prosecutors were present, one sitting with the grand jurors at their conference table “as if he were one of them.”¹³⁸ Both “smirked” a lot.¹³⁹ According to Clark, one of the prosecutors

¹³² *Brown*, 356 U.S. at 155-56.

¹³³ *Kansas v. Cheever*, 134 S. Ct. 596, 601 (2013) (quoting *Brown*, 356 U.S. at 156).

¹³⁴ Flynn, *supra* note 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

explained to the grand jury that the two officers “had to be brave” when approaching Tamir Rice, and that, in fact, “[t]hey *were* brave that day.”¹⁴⁰

The Rice family also hired Jeffrey Noble, a former officer from Irvine, California, to review the case. He likewise concluded that the use of force was unreasonable and likewise described an extremely hostile reception from the prosecutors.¹⁴¹ He notably stated, “I’ve never had to fight so hard to defend myself in the midst of a presentation,” and “I’ve definitely never seen two prosecutors play defense attorney so well.”¹⁴²

The Rice family lawyers hired a third expert, Jesse Wobrack, a biomechanics expert, who gave a similar account of his hostile reception by the prosecutors in the grand jury.¹⁴³

These claims should be taken with a grain of salt as they are given by experts hired by the Tamir Rice family. Moreover, the prosecutors cannot respond to these claims because they are prohibited from doing so by grand jury secrecy rules.¹⁴⁴ Nonetheless, these three similar accounts provide some of the limited evidence available about what occurred in this grand jury proceeding.

Had a grand jury victim advocate been participating in the grand jury, that lawyer could have presented these expert witnesses and allowed them to give their views. Prosecutors likely would have given them the same hostile reception, but strong arguments from the victim advocate would have countered such a one-sided view.

Moreover, it is reasonable to infer from the facts above that the prosecution’s own expert witnesses—who concluded that the shooting was justified—were not subjected to any probing cross-examination or serious questioning of their conclusions. Again, had a victim advocate been present, these experts would have been vigorously cross-examined—as to their qualifications, their past work, and their reasoning and conclusions in the Tamir Rice shooting.

Overall, the limited information that has been revealed about the Tamir Rice grand jury presentation conveys the strong impression that prosecutors came to the conclusion that the shooting was justified and then vigorously and zealously advocated for that conclusion before the grand jury. A victim advocate would have vigorously and zealously advocated to the contrary—that the shooting was unjustified.

It is impossible to say what the outcome would have been in that scenario and whether any indictments would have been returned. But with an advocate representing the interests of the Tamir Rice family, the grand jury would have had the opportunity to operate more independently. The grand jury would not have found itself entirely reliant on the prosecution to hear the witnesses and the evidence. It would have been exposed to a contrary point of view—an advocate who would have been eager to help the grand jury track down any evidence or witnesses that might support charges.

¹⁴⁰ *Id.* (emphasis in original).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See OHIO R. CRIM. P. 6(E) (2017).

It is hard to imagine how a grand jury of untrained laypersons, without access to their own resources or legal expertise, could serve as much more than a rubber stamp to a determined prosecutor in a case like the Tamir Rice shooting. A grand jury victim advocate would be an important step toward empowering the grand jury to act as an independent deliberative body. That independent body could then act not only to screen out unwarranted prosecutions, but also to assess whether prosecution of a government official (the police officers) might indeed be warranted even though another government official (the prosecutor) has concluded otherwise.

VI. CONCLUSION

Grand juries have long been criticized for their lack of independence and overreliance on prosecutors. In several recent high-profile cases involving police use of deadly force, prosecutors have presented evidence to the grand jury but advocated strongly against any criminal charges—and grand juries have followed the prosecutor's guidance.

An independent grand jury, freed from prosecutorial dominance, could serve as an important democratic check on police misconduct. This role was common throughout American history—independent grand juries brought charges against government officials engaged in wrongdoing even when local prosecutors were reluctant to bring charges or were complicit in the corruption.

Authorizing the alleged victim of police excessive force to be represented before the grand jury would ensure that the grand jury in police cases hears from a representative whose interests are aligned with the complainant rather than the police. The grand jury victim advocate would therefore (1) help the grand jury to speak again as the voice of the community, (2) help to rediscover and reclaim the tradition of grand jury independence, and (3) provide democratic oversight in cases of alleged police misconduct.

